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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.J.,

a Person Coming Under the
Juvenile Court Law.

B289490

(Los Angeles County
Super. Ct. No. DK20650)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.P.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los
Angeles County, Stephen C. Marpet, Commissioner.
Conditionally reversed and remanded.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

L.P. (Mother) appeals from the juvenile court's dispositional order issued after the court sustained a Welfare and Institutions Code¹ section 342 petition alleging that A.J., a minor, came within the jurisdiction of the court. Without contesting the merits of the order, Mother contends we should conditionally reverse it because the Department of Children and Family Services (DCFS) failed to inquire of the child's father (Father²) whether he had Indian ancestry; thus, DCFS failed to comply with the Indian Child Welfare Act (ICWA) and related California laws. DCFS argues we should affirm all findings and orders, except we should reverse the court's finding that the ICWA is inapplicable and remand with directions to the court to ensure that DCFS conducts an appropriate investigation and otherwise complies with the ICWA. We disagree; accordingly, we conditionally reverse the dispositional order and remand for compliance with the ICWA.

¹ Subsequent section references are to the Welfare and Institutions Code.

² The initials of the minor and the minor's father are the same; therefore, we refer to the father simply as "Father." Father is not a party to this appeal.

BACKGROUND³

In September and October 2016, DCFS received referrals alleging that in August 2016, police arrested Father for the death of three-month-old Immanuel Johnson, who had suffered physical abuse, including broken ribs. The referrals also alleged that two siblings, including A.J., were at risk. On October 4, 2016, Mother told a Los Angeles County children's service worker (CSW) that Mother did not know whether A.J. had Indian ancestry. That day, the CSW unsuccessfully attempted to contact Father; he was in an Oakland jail. On December 9, 2016, the CSW spoke with Father, who remained in Oakland after he was released from jail. The CSW's report relating the conversation does not reflect that the CSW asked Father, or that Father said, whether he had Indian ancestry.

On December 12, 2016, DCFS filed a section 300 petition alleging that A.J. came within the jurisdiction of the juvenile court under section 300, subdivisions (a), (b), (f), and (j). In a December 12 detention report, the CSW stated that A.J. lived with Mother, Father recently had been released from jail and his whereabouts were unknown, and the ICWA was inapplicable.

On December 12, 2016, Mother filed a parental notification of Indian status stating she had no Indian ancestry as far as she knew. On that date, the juvenile court found that a prima facie case had been established that A.J. was a child described in section 300, subdivisions (a), (b), and (f). The court ordered him

³ The failure to comply with the ICWA is the sole basis for Mother's appeal; therefore, we discuss only the facts pertinent to the ICWA issue.

detained, vested temporary placement and custody of him in DCFS, and ordered him released to Mother. The court stated that Father was the presumed father of A.J. The court indicated (1) it did not have reason to know that A.J. was an Indian child as defined by the ICWA, and thus (2) it did not order that notice be given to any tribe or to the Bureau of Indian Affairs.

On June 14, 2017, a CSW spoke to Father by phone. Father indicated that he was homeless. The CSW's report relating the conversation does not reflect that the CSW asked Father, or that Father stated, whether he had Indian ancestry. On August 25, 2017, Father was in state prison in Delano, California. On September 14, 2017, the juvenile court issued an order requiring Father's appearance at A.J.'s October 3, 2017 custody hearing unless Father waived his right to appear. On September 22, 2017, Father waived his right to appear.

At an October 13, 2017 adjudication hearing, the court sustained the petition, declared A.J. a dependent, and ordered him removed from the custody of his parents and placed in the home of Mother.

On January 18, 2018, a CSW received information that Mother had told a person that Mother had used drugs but she had stopped using them in November 2017. The person did not know if the drug use affected A.J. On January 22, 2018, Mother told the CSW that Mother believed the above person was Mother's therapist.

On February 1, 2018, DCFS filed a section 342 subsequent petition alleging that A.J. came within the jurisdiction of the juvenile court under section 300, subdivision (b), because Mother was currently using methamphetamine and marijuana. The

detention report filed on that date indicated Father's whereabouts were unknown.

On April 13, 2018, the court sustained the subsequent petition. In the dispositional order, the court declared A.J. a dependent, ordered him removed from the custody of his parents, and ordered him suitably placed.

DISCUSSION

The Dispositional Order Must Be Conditionally Reversed

Mother claims that DCFS erred by failing to discharge its duty of inquiry of Father for ICWA purposes and that the error warrants remand of the matter for compliance with the ICWA inquiry and notice provisions. (See Cal. Rules of Court, rule 5.481(a) [DCFS and the court “have an affirmative and continuing duty to inquire whether a [dependent] child is or may be an Indian child”]; *In re J.N.* (2006) 138 Cal.App.4th 450, 461-462 [failure to conduct the ICWA inquiry requires remand]; *In re Asia L.* (2003) 107 Cal.App.4th 498, 506 [the dependency court must determine whether proper notice was given and whether the ICWA applies and “the record must reflect that the court considered the issue and decided whether ICWA applies”].) DCFS similarly acknowledges that “[t]he juvenile court’s failure to order DCFS to use reasonable diligence to find and inform [F]ather of the need to complete a Parental Notification of Indian Status form was error.”

Here, the only point of contention between the parties is whether this court should conditionally reverse the dispositional order and remand to conduct the ICWA inquiry or remand for the

inquiry after reversing the court's finding that the ICWA is inapplicable but affirming all other findings and orders.

DCFS contends the latter approach is appropriate because Mother "cannot show any error in the disposition orders or that she has been prejudiced unless and until it is determined that [A.J.] is, in fact, an Indian child." DCFS relies in part on *In re Rebecca R.* (2006) 143 Cal.App.4th 1426 (*Rebecca R.*) to support this contention. In *Rebecca R.*, the father contended the ICWA was violated because the record contained no documentation to show that the social services agency had asked him whether he had Indian ancestry, even though it had been ordered to do so. The appellate court concluded that any error was harmless because "there can be no prejudice unless, if he had been asked, [the] father would have indicated that the child did (or may) have such ancestry." (*Id.* at p. 1431, italics omitted.)

The court explained: "[The f]ather is here, now, before this court. There is nothing whatever which prevented him, in his briefing or otherwise, from removing any doubt or speculation. He should have made an offer of proof or other affirmative representation that, had he been asked, he would have been able to proffer some Indian connection sufficient to invoke the ICWA. He did not. [¶] In the absence of such a representation, the matter amounts to nothing more than trifling with the courts. [Citation.] The knowledge of any Indian connection is a matter wholly within the appealing parent's knowledge and disclosure is a matter entirely within the parent's present control." (*Rebecca R.*, *supra*, 143 Cal.App.4th at p. 1431.)

Rebecca R. is distinguishable. Essential to *Rebecca R.*'s prejudice analysis is the fact that the father complained on appeal that he was not asked about *his* Indian ancestry. Here,

Mother does not argue that she was not asked about her Indian heritage; in fact, she indicated that she does not have any Indian ancestry. Rather, she contends that *Father* was not asked about *his* Indian heritage. Thus, unlike the situation in *Rebecca R.*, we cannot say that the “knowledge of any Indian connection is a matter wholly within the appealing parent’s knowledge.” (*Rebecca R.*, *supra*, 143 Cal.App.4th at p. 1431.) Indeed, there is nothing in the record to indicate that Mother has any knowledge of the Father’s ancestry, and he, the parent who presumably does have such knowledge, is not before this court. To hold the error harmless, we would have to speculate that Father would deny such ancestry if asked, which we decline to do. (See *In re J.N.*, *supra*, 138 Cal.App.4th at p. 461 [the court refused to speculate about parent’s response to an ICWA inquiry].)

Indeed, the error compromised other requirements, rights, and benefits provided under the ICWA to the child and any tribe. For example, the ICWA sets higher evidentiary standards for the placement of an Indian child in foster care than state law does for a non-Indian child. (See 25 U.S.C. § 1912(e)-(f).) And because there is no reason to believe that the court applied the higher ICWA standards in suitably placing A.J., the dispositional order must be conditionally reversed. Most importantly, if A.J. has Indian heritage, a tribe may want to intervene to place him.

Consequently, because the juvenile court failed to ensure compliance with the ICWA requirements, the better approach here, in our view, is to conditionally reverse the dispositional order. “This does not mean the trial court must go back to square one,” but that the court ensures that the ICWA requirements are met. (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 237; see *In re Francisco W.* (2006) 139 Cal.App.4th 695, 705 [“The limited

reversal approach is well adapted to dependency cases involving termination of parental rights in which we find the only error is defective ICWA notice”].)

DISPOSITION

The dispositional order is conditionally reversed and the case is remanded to the juvenile court with directions to inquire of A.J.’s father whether A.J. is or may be an Indian child. (See Cal. Rules of Court, rule 5.481(a).) If the inquiry produces no evidence that A.J. is or may be an Indian child, or if there is no intervention or assertion of jurisdiction by any tribe after proper notice, then the juvenile court may reinstate the dispositional order. (See *In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 708.)

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.